

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN L. CULLY

Claimant

VS.

EARTHGRAINS/SARA LEE BAKERY GROUP

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**

Insurance Carrier

Docket No. 1,020,951

ORDER

Claimant appeals the April 12, 2006 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded benefits for a 2 percent impairment of function to the left lower extremity. Claimant contends he is entitled to a permanent partial general whole body disability, having suffered simultaneous aggravation to both knees as a result of his employment with respondent. Respondent argues that claimant failed to prove any permanent impairment as a result of his work with respondent or, in the alternative, the Board should affirm the 2 percent award of the Administrative Law Judge (ALJ). The Appeals Board (Board) heard oral argument on August 2, 2006.

APPEARANCES

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. At oral argument before the Board, the parties agreed that if claimant's date of accident is found to be February 26, 2004, the appropriate average weekly wage would be \$676.84.

ISSUES

1. What is the appropriate date of accident in this matter?
2. What is the nature and extent of claimant's injuries suffered out of and in the course of his employment with respondent? More particularly, did claimant prove that he suffered permanent partial general disability while employed with respondent? Additionally, did claimant's injuries, if proven, result in a functional impairment to the left lower extremity or did claimant prove injury and simultaneous aggravation to his bilateral knees?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 19 percent permanent partial disability to the whole body for the injuries suffered out of and in the course of his employment with respondent.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions insofar as they do not contradict the findings and conclusions contained herein.

Claimant began working in respondent's bakery in Hutchinson, Kansas, in 1984. At the time of claimant's hire, he had a history of left knee injuries, having undergone an open meniscectomy in 1971. Claimant recovered from that surgery and was asymptomatic at the time of his hire with respondent.

Claimant's job with respondent required he be on his feet all day, working on concrete floors. Claimant suffered a work-related injury on February 26, 2004, when he twisted while shoving a rack. Claimant injured his left knee when the knee gave out. Claimant was provided medical treatment, eventually coming under the care of board certified orthopedic surgeon Kenneth A. Jansson, M.D. Dr. Jansson performed surgery on claimant's left knee on April 20, 2004, performing a diagnostic arthroplasty of the left knee; partial medial meniscectomy; chondroplasty of the lateral femoral condyle, medial femoral condyle, trochlea and patella; abrasion arthroplasty of the medial tibial plateau; and debridement of an anterior cruciate ligament (ACL) cyst. Dr. Jansson testified that basically, claimant had a lot of degenerative changes in the knee, with arthritis by the patella, and a little medial meniscus tear, with an ACL cyst. Dr. Jansson found no evidence of a fresh traumatic injury. He assessed claimant a 2 percent functional

impairment to the left knee pursuant to the fourth edition of the *AMA Guides*¹ and released claimant to return to work on June 9, 2004, without restrictions.

Dr. Jansson had treated claimant in 2000 for an injury to his right knee. On May 9, 2000, he performed an arthroscopy on the right knee, repairing a torn medial meniscus. Dr. Jansson rated claimant's right knee at that time at 5 percent to the right lower extremity pursuant to the fourth edition of the *AMA Guides*.²

After the April 2004 surgery, claimant used crutches for two or three days. He wore a brace on his left knee until June 9, 2004. This brace was uncomfortable and made his already weaker right knee his dominant knee. Claimant was released to return to his regular work duties on June 9, 2004. Claimant testified that after the February 26, 2004 left knee injury, his right knee began to hurt more due to the need to use it for the "brunt" of claimant's walking, standing and moving around.

Claimant continued to perform his regular work duties until the respondent's bakery closed on December 3, 2004. During this time, claimant's condition in his right knee grew worse. Claimant was off work for approximately one week. He then began working in respondent's bakery in Wichita, Kansas. Claimant is currently earning more money per week at the Wichita bakery than he earned for respondent in Hutchinson.

Claimant was referred to board certified rehabilitation and physical medicine specialist Pedro A. Murati, M.D., by his attorney for an examination on January 17, 2005. This was not the first time Dr. Murati examined claimant, having seen him in 2001 as a result of the 2000 injury to his right knee. Dr. Murati assessed claimant a 20 percent functional impairment to the right knee at that time, pursuant to the fourth edition of the *AMA Guides*.³

When Dr. Murati examined claimant on January 17, 2005, he diagnosed claimant as being post left knee partial medial meniscectomy, with chondroplasty of the lateral femoral condyle, medial femoral condyle, trochlea, and patella; abrasion arthroplasty of the medial tibial plateau, and debridement of an ACL cyst; and bilateral patellofemoral syndrome, preexisting on the right.

Dr. Murati rated claimant at 41 percent to the left lower extremity, after deducting 5 percent for the patellofemoral syndrome. This converted to a 16 percent whole person impairment. He also rated claimant at 20 percent total impairment to the right lower

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ *AMA Guides* (4th ed.).

extremity, after deducting 8 percent preexisting. This then converted to an 8 percent whole person impairment. Combining the ratings, Dr. Murati found claimant had suffered a 23 percent whole person impairment for the bilateral knee injuries suffered while employed with respondent. He testified that after injuring his left knee, claimant aggravated his preexisting problem on the right knee. He also diagnosed claimant with flexion contractures of both knees, which will lead to overuse injuries of the knees. He testified that claimant's work on concrete at least 8 hours a day would permanently accelerate the development of arthritic changes in claimant's knees.

Claimant was referred by the ALJ to board certified orthopedic surgeon C. Reiff Brown, M.D., for an independent medical examination on September 14, 2005. Dr. Brown found claimant to have preexisting patellofemoral syndrome, resulting in progressive chondromalacia of the patellas. He also diagnosed preexisting medial meniscus removal which resulted in progressive deterioration of the left knee, particularly the medial compartment. He noted that these bilateral preexisting conditions have, over the years, been aggravated by claimant's work activities. The incident on February 26, 2004, markedly aggravated the left knee, which then secondarily aggravated the right knee due to the extra stress placed on the right knee. He found claimant to be at maximum medical improvement, but cautioned that claimant would, at some point in the future, require a total knee joint replacement. He assessed claimant a 19 percent permanent partial impairment of function to the whole body for the injuries suffered while working for respondent.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁶

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural

⁴ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁷

The Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation. The date of injury is the last day worked.⁸

Here, claimant worked for respondent, performing the same duties through his last day on December 3, 2004, at which time respondent's bakery closed. Both Dr. Murati and Dr. Brown agreed that claimant's work activities aggravated his bilateral knee conditions. The Board finds, pursuant to *Kimbrough*, that claimant's date of accident is the December 3, 2004 last day worked. The Board, therefore, adopts claimant's average weekly wage of \$683.60 as appropriate for this award.

The Board also finds that claimant's aggravation was bilateral. The injuries which occurred both on February 26, 2004, and through claimant's last day with respondent aggravated both of his knees. Claimant suffered simultaneous aggravation of both knees and, in addition, claimant's right knee was injured as a direct consequence of overcompensation from the original left knee injury.⁹ The Board finds the opinion of the independent medical examiner, Dr. Brown, to be the most credible with regard to claimant's overall permanent impairment. Therefore, the Award of the ALJ is modified to award claimant a 19 percent permanent partial whole body functional disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated April 12, 2006, should be, and is hereby, modified to award claimant a 19 percent permanent partial whole body disability for the injuries suffered through his last day worked, December 3, 2004, and based on an average weekly wage of \$683.60. An award of compensation is hereby made in accordance with the above findings in favor of the claimant, and against the respondent, Earthgrains/Sara Lee Bakery Group, and its insurance carrier, Indemnity Insurance Company of North America, for the accidental injuries which occurred through December 3, 2004, for a 19 percent permanent partial disability.

⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁸ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

⁹ *Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff'd* 271 Kan. 865, 26 P.3d 666 (2001).

Claimant is entitled to 78.85 weeks of permanent partial disability compensation at the rate of \$449 per week for a total award of \$35,403.65.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael , Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier